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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1018 1132

STANLEY G. BANDEEN, - - - - - - Petitioner,

versus

E. M. HOWARD, J. WATTS STOVALL, BRUCE UNDERWOOD, GEORGE S. COON, THOMAS P. LEONARD, W. H. FULLER, CARL J. JOHNSON, R. W. ROBERTSON, CLARENCE DAVIS, Individually and Collectively as Constituting the STATE BOARD OF HEALTH OF KENTUCKY, and

JAMES F. QUEENAN, Clerk of the Jefferson County Court, - - - - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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Dated: May 20, 1957.

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IN THE

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OCTOBER TERM, 1956

No. _____.

STANLEY G. BANDEEN, - - - - - *Petitioner,*

v.

E. M. HOWARD, J. WATTS STOVALL, BRUCE UNDERWOOD, GEORGE S. COON, THOMAS P. LEONARD, W. H. FULLER, CARL J. JOHNSON, R. W. ROBERTSON, CLARENCE DAVIS, Individually and Collectively as Constituting the STATE BOARD OF HEALTH OF KENTUCKY, and

JAMES F. QUEENAN, Clerk of the Jefferson County Court, - - - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Your petitioner, Stanley G. Bandeen, respectfully prays that a writ of certiorari issue to review a judgment of the Kentucky Court of Appeals (highest State court), entered October 5, 1956, which became final February 22, 1957. This judgment recognizes as valid an Order which revokes petitioner's license to practice osteopathy in Kentucky.

OPINIONS OF THE STATE COURTS.

The basis for this action was a proceeding before the State Board of Health of Kentucky to revoke petitioner's osteopathic license. The decision in that proceeding was rendered December 13, 1951, in a document entitled "Findings and Order of State Board of Health". This Order is not officially reported, but a copy is included herewith as Appendix B-7. This Order was to become effective at a designated time unless appealed to the Governor. The statute (Appendix A-2) authorized the Governor, on appeal, to affirm or overrule.

Petitioner believed that the Order was void on several grounds, and appealed to the Governor. The Governor failed to make any decision while the Act authorizing such appeal was in effect.

The State Board later sought to enforce the suspended Order. The statute under which the Order was made did not authorize a Court appeal. When court appeals from administrative boards are not provided, Kentucky practice recognizes the remedy in proper cases of injunctive relief. *Kendall* v. *Beiling*, 295 Ky. 782, 175 S. W. 2d 489.

This injunction suit was then filed in the Franklin Circuit Court. The Chancellor denied an injunction in a very short opinion (Appendix B-5). A copy of that Court's judgment is filed as Appendix B-4. This judgment was appealed to the Kentucky Court of Appeals, and was affirmed there. That Court's opinion

is officially reported now as Bandeen v. Howard, *et al.*, Ky., 299 S. W. 2d 249. This opinion is included herewith as Appendix C-6.

JURISDICTION.

The opinion and judgment of the Court of Appeals of Kentucky were entered October 5, 1956. A petition for rehearing filed in that Court was overruled February 22, 1957, so the judgment became final then.

The jurisdiction of this Court rests upon 28 U. S. C., Section 1257(3).

QUESTIONS PRESENTED.

Dr. Stanley G. Bandeen received from the State Board of Health of Kentucky an order to appear before the Board at a designated time to show cause why his license to practice osteopathy should not be revoked. As the statute authorized revocation proceedings only on complaint, petitioner sought compliance with the statute, but never was furnished a complaint.

Nevertheless, he was notified to appear for a hearing on September 7, 1950, and did. The proceedings resulted in an order entered fifteen months later revoking his license to practice, but suspending the order in case of appeal to the Governor. The statute gave the right of appeal to the Governor (Appendix A-2). Petitioner filed an appeal, which was pending when the law was repealed.

Petitioner believes that State Board Order was void, and that it never legally became effective. The questions which are presented by this petition are:

1. Did the State Board of Health of Kentucky have jurisdiction to hear proceedings to revoke the license of Dr. Stanley G. Bandeen to practice osteopathy which had been granted to him by it, without complying with the Statute by furnishing him copy of any complaint?
2. Can the State Board of Health of Kentucky admittedly consider as evidence, and base its decision at least in part upon, facts not in evidence?
3. Is an Order of the State Board of Health of Kentucky revoking a license to practice osteopathy, never affirmed by the Governor while law in effect, and made without finding any specific facts as basis for such an order, valid and enforceable?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The statutes in Kentucky involved in this action are mainly the Medical Practice Act in effect in 1950, 1951 and 1952. The pertinent provisions are:

Procedure in Revocation Proceedings—Section 311.120, Kentucky Revised Statutes (1948 Ed.) —(Appendix A-2):

Grounds for Suspension or Revocation—Section 311.110, Kentucky Revised Statutes (1948 Ed.) —(Appendix A-1):

Express Repeal of these Sections—Kentucky Acts 1952, Chapter 150, Section 18—(Appendix A-4).

The constitutional provisions are the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE.

In Kentucky the admission to practice and supervision of practice of osteopathy are placed in the State Board of Health. This Board is composed of 5 allopathic physicians, 1 osteopathic, 1 hemeopathic, 1 eclectic physician and 1 pharmacist. Dr. Stanley G. Bandeen was admitted to practice osteopathy in Kentucky in 1926, and has practiced in Kentucky ever since.

Prior to admission he had graduated in pre-medical work at the University of Wisconsin, in Veterinary Medicine at Michigan State College and in osteopathy at the American School of Osteopathy at Kirksville, Missouri. He had taught in this last institution. He said he also had a medical degree, but its nature was not discussed in evidence because that was not in issue before the State Board. Dr. Bandeen is a member, on invitation of several scientific societies.

He had been licensed to practice osteopathy in Missouri in 1924 and was admitted in Kentucky in 1926 through reciprocity. In 1933 Dr. Bandeen and all other doctors admitted through reciprocity were required to take examinations. The same examination was given to osteopaths and allopathic doctors. Dr.

Bandeen passed the examination and was given an unlimited license to practice medicine in Kentucky.

Dr. Bandeen has practiced osteopathy in Louisville ever since. He is now 64 years of age. He was at one time listed under the telephone column "Physicians and Surgeons (M.D.)". He testified that he had the required education for allopathic medicine, but did not desire to practice that branch even if he had received an unlimited license.

The license revocation proceedings started in April, 1950. Dr. Bandeen received a show-cause letter for revocation of his license (Appendix B-1). This letter gave him no information as to any complaint, as to any patient, as to any particular conduct. Since the Statute provided that the license holder must be furnished with a complaint, he tried hard to get a copy. Four months later he received another show-cause letter with an unsigned paper marked "Copy of Complaint".

A hearing was held on September 7, 1950, with evidence as to two patients not living and as to one who had been dissuaded from returning to see him. In this hearing the testimony showed that Dr. Bandeen sometimes used an oxidizing medicine known as the Koch Treatment. He said the use of this medicine included previous heart examination, blood examination, physical check-up, X-rays when necessary, purchase of medicine and care for some weeks thereafter, all for one lump charge.

Dr. Bandeen said this medicine is not given to cure a disease, but to restore the body to normal condition so it can throw off disease. Dr. Underwood, the Board Secretary, said as to this medicine: "We don't say it is no good. We say there is some question as to the value of it." Dr. Bandeen said that the American Medical Association does not recommend it.

The State Board refused to go into the merits of this medicine. The hearing was on September 7, 1950. About the end of November, 1951, counsel for the State Board filed a reply brief with an opinion of the Federal Trade Commission as an appendix. On December 13, 1951, the State Board entered an Order revoking Dr. Bandeen's license to practice osteopathy or any healing art.

The Statute gave a right to appeal to the Governor, who could affirm or overrule the decision (Appendix A-2). The Statute was expressly repealed effective June 19, 1952 (Appendix A-4). The Governor had not acted on the appeal, and the new Act had entirely new procedure.

The Order of December 13, 1951, was never affirmed while the Act was in effect, so this revocation proceeding remained unfinished. Nevertheless, the State Board attempted to enforce the Order. So this injunction suit was filed. The petition in equity (Appendix C-1) included as grounds for relief:

1. The State Board of Health had no jurisdiction to hear the proceeding;

2. The State Board denied petitioner a fair and impartial hearing;
3. The State Board's Order never became effective, and was void because the State Board made no findings of facts.

That petition claims that all these grounds violated petitioner's rights under the due process clause of the Fifth Amendment to the United States Constitution (Appendix C-1, p. 47). The petition claims that the third ground violates petitioner's rights under the Fourteenth Amendment to this Constitution by depriving petitioner of property without due process of law, and denying him equal protection of the laws. These same constitutional points had been raised in the Appeal to the Governor (Appendix B-8).

Respondents filed an answer admitting that their decision was based partly on findings in the Federal Trade Commission opinion. This Commission opinion was rendered just 3 days less than a year after the only hearing by the State Board. This opinion will be discussed later, but it certainly was not introduced in evidence.

The Answer stated also that the State Board's opinion was based on petitioner prescribing and administering the Koch Cancer Treatment and on petitioner falsely representing that he was licensed to practice medicine, and other acts.

The charge sheet which was fictitiously labelled "Copy of Complaint" had not mentioned any telephone listing. Evidence as to it was admitted over objection.

Certainly that issue was not before the State Board. The unsigned Copy of Complaint had listed in specific charges "The use of medicine of doubtful value". But the point was hardly mentioned in evidence.

The Chancellor considered the case for about eight months, then denied the injunction, in just a few words. The judgment was promptly appealed. The Kentucky Court of Appeals had it under submission almost two and a half years.

The opinion of that Court affirmed the Chancellor's judgment. The Court disposed of the first point by saying that a complaint was filed by the State Board. The opinion says (p. 251) (Appendix C-6, p. 72):

> "Bandeen's challenge to the jurisdiction of the Board is bottomed upon the contention that it initiated the instant proceeding against him in its name, whereas it is maintained the correct mode of preferring charges against him was by the verified complaint of some individual. This position is untenable. There was nothing in the applicable statutes in effect in 1950 which prohibited the Board from instituting a revocation proceeding upon the basis of information received by it or by any member thereof. It is well established that in the absence of express statutory restraints an administrative agency may inaugurate investigations and hearings of the character under discussion on its own motion. This is one of the distinctive functions of such agencies which sets them apart from the courts. See 42 Am. Jur., Public Administrative Law, Sec. 31, p. 323; Federal Communications Commission v. Pottsville

Broadcasting Co., 309 U. S. 134, 608 S. Ct. 437, 84 L. Ed. 656, 662."

The Opinion disposes of the second point as to not having a fair and impartial trial by holding the evidence to be immaterial or to be a finding of law, rather than of fact. The Opinions says (p. 254) (Appendix C-6, p. 72):

"It is true the secretary of the Board did much of the questioning of Bandeen, but this was not improper under the circumstances. Also, during the hearing, the secretary was permitted to give general information surrounding the complaints against Bandeen over the years. Bandeen argues this was prejudicial and denied him a fair hearing. It is patent the secretary's statements were pure hearsay and not competent for any purpose. However, Bandeen was given ample opportunity to introduce rebuttal evidence. Proceedings before administrative boards are informal and a wide latitude is allowed in taking proof and the technical rules of procedure are not ordinarily enforced. See Goodrich v. Selligman, 298 Ky. 863, 183 S. W. 2d 625. The secretary abstained from voting to revoke Bandeen's license. Furthermore, there was ample evidence other than that contained in the report of the secretary to sustain the Board's order. As to Bandeen's theory that he was dealt a wrong because the Board relied upon the Federal Trade Commission opinion in arriving at the conclusion it reached, our answer to that is the opinion was a finding of law, and not one of fact, hence the Board could take judicial notice of it. Especially is this true since the Federal Trade

> Commission opinion was later affirmed by the United States Court of Appeals for the Sixth Circuit."

The Opinion disposes of the third point by holding that the jurisdiction of the Board was not disturbed, and the appellate jurisdiction was transferred to the Jefferson Circuit Court. As to the Board having no authority to revoke a license without finding the necessary facts, the Kentucky Court of Appeals says only that the Statute does not require this to be done, and such findings are not required for due process of law (p. 253). The Opinion says (Appendix C-6, p. 72):

> "It is next argued the order was a nullity because it did not set out any findings of fact. The statute under which the proceeding was instituted and conducted did not require that such be done. Written special findings by administrative agencies are not necessary in order to meet due process of law requisites. See Davis on Administrative Law (1951 Ed.), pp. 524 and 526."

This means that the Kentucky Court of Appeals in effect held that despite the flaunting of the statutory provisions as to procedure, this did not violate petitioner's constitutional rights as to jurisdiction. We believe that this position is not in accord with applicable decisions of this Court.

The holding that facts considered by the State Board and by the Kentucky Court of Appeals, which were not in evidence, can be considered as findings of law, is certainly contrary to applicable decisions of this Court.

The Kentucky Court of Appeals directly decides the constitutional point as to findings being required to make an Order based on such findings. We believe that that holding is also not in accord with applicable decisions of this Court.

The Petition for Rehearing in the Kentucky Court of Appeals insisted that these points, which were being urged there, and are the basis of this petition, involve constitutional guaranties.

The Kentucky Court of Appeals also made mistakes as to the evidence, which might help account for its decision. Dr. Bandeen did not testify that he had no right to use the professional title of Doctor of Medicine, or that he was not entitled to engage in the general practice of medicine. That was not an issue before the State Board, but a member of the State Board eliminated that question anyhow. Dr. Carl J. Johnson responded to the Secretary of the Board as follows:

> "Dr. Johnson: No, he has an unlimited license, but it makes no difference in the State of Kentucky whether he graduated from the osteopathic school, it makes no difference; you have the same requirements. You have to go through the same college training, and you have to take the same examination, and you get the same license, and since 1936—I think it was '35 this resolution was passed —Dr. Bandeen previous to that had not taken the examination in the practice of medicine. Then he took the examination for the practice of medicine and was given an unlimited license."

That Court accepted controverted statements of a Mr. Rucker as to his wife, who had been a patient several years before. This patient had other doctors attend her. To give the medical opinions he gave, at least one of the doctors should have been called.

The only patient who testified said Dr. Bandeen quoted $150 for a hemorrhoid operation. The Opinion says she paid this. The witness says she paid nothing; she did not return for treatment. The Court of Appeals finds facts to uphold the Order, but those facts were not in issue or in evidence, and no statute gave any Court the right to revoke licenses. The telephone listing for a short time was not on the charge sheet. The facts claimed now as to the Koch Treatment were never in evidence. There was no point raised as to an opportunity to produce counter-evidence. Petitioner did not know that was used as a basis for the State Board's Opinion until the Board's Answer obligingly so stated. He has insisted that evidence not introduced at the hearing had no place in this proceeding.

REASONS FOR GRANTING THE WRIT.

The Order of the State Board of Health would take from petitioner the right to use his professional education and the opportunity to earn a living. The effect of such an order is expressed very appropriately in a case holding a previous Medical Practice Act in Kentucky to be unconstitutional. This was the case of *Matthews, et al.* v. *Murphy*, 63 S. W. 785, 23 K. L. R.

750, 54 L. R. A. 415, where that Court said (63 S. W. 786):

> "The effect of such action of the board would cause the appellee to lose a large sum of money which he has spent for his professional education, and bar him from the acquisition of a livelihood thereby, and at the same time mar his character in such a way that it would take years, if he could do so at all, to remove it."

Since the action of the Board has been so drastic, it is essential that the State Board have had jurisdiction, have conducted its *quasi*-judicial proceedings in a fair and impartial manner, and have taken action only in a legal and constitutional manner. Petitioner insists that his rights under the United States Constitution have been violated in all three ways.

1. NO JURISDICTION TO HOLD PROCEEDING.

Did the State Board of Health of Kentucky have jurisdiction to hear proceedings to revoke the license of Dr. Stanley G. Bandeen to practice osteopathy which had been granted to him by it, without complying with the Statute by furnishing copy of any complaint?

The Medical Practice Act of 1904 (still in effect in 1950) was enacted after the 1893 Act had been held unconstitutional in the *Murphy* case just cited. In a case attacking the 1904 Act, *Forman* v. *State Board of Health of Kentucky*, 157 Ky. 123, 162 S. W. 796, the Kentucky Court of Appeals said (157 Ky. 129):

"The proceeding is not judicial; it is purely administrative. The State may create a board to grant licenses to physicians and may authorize the same board to revoke a license they have granted. Arbitrary power cannot be conferred on the board; it may not act arbitrarily but must act upon reasonable grounds and in compliance with the statute."

In a case involving alleged inefficiency and negligence of a chief of police, *Bregel* v. *City of Newport*, 208 Ky. 581, 271 S. W. 665, the Kentucky Court of Appeals, in holding the complaint insufficient, said (208 Ky. 582-3):

"This charge is not sufficient under the statute. It does not set out with clearness or distinctness any charge. There is a similar statute authorizing a lawyer to be disbarred for neglect or lack of moral character, but it is uniformly held that the specific charges must be made with sufficient distinctness to enable the person charged to know the acts which are charged against him. There is a similar statute in regard to physicians. The original act was held unconstitutional in Matthews v. Murphy, 63 S. W. 785, 23 Ky. Law Rep. 750, 54 L. R. A. 415, for uncertainty, and the amended statute was sustained on the ground that it prescribed a standard, and the prosecution under this statute was sustained when the specific acts charged against the defendant were set out, although it was held in that case that the court would not grant an injunction restraining the board from trying the case. Forman v. State Board of Health, 157 Ky. 123, 162 S. W. 796. The

charge here did not inform the defendant as to the specific things he had done or omitted to do in violation of his duty."

The provision of the Kentucky Statutes as to instituting revocation proceedings before the State Board of Health (Section 311.120(1)) is perfectly clear. It says:

> "In every proceeding for suspension or revocation the holder of the license shall be furnished with a copy of the complaint and given at least thirty days thereafter to prepare for the hearing."

This provision is certainly understandable. Complaints were filed and copies furnished in the *Murphy* case, the *Forman* case and the *Bregel* case cited *supra*. In the case of *Walker* v. *Commonwealth*, 8 Bush (71 Ky.) 86, involving disbarment of a lawyer, the Kentucky Court of Appeals said (p. 96):

> "Now where the party is charged with malpractice without the presence of the Court, the correct mode of proceedings against him is by complaint or information on the oath of some individual."

The Kentucky Court of Appeals has recognized that strict compliance with statutory procedure by an administrative board is absolutely necessary for jurisdiction.

Louisville and Jefferson County Planning and Zoning Commission v. *Ogden*, 307 Ky. 362, 210 S. W. 2d 771;

Pond Creek Pocahontas Co. v. *Breathitt County*, Ky., 290 S. W. 2d 34.

It certainly seems to have been intended that some person, other than a member of the tribunal to hear a complaint, should file same. Regardless of who filed the complaint, compliance with this Statute can only be had by the licensee being "furnished with a copy of the complaint".

The proceeding against petitioner was started with a show-cause letter. Petitioner's special demurrer to this form of notice was overruled, but the State Board did sustain petitioner's motion for a copy of the complaint. He never got it, however. Four months later he got another show-cause letter with scattered or "shot-gun" charges on an unsigned paper entitled "Copy of Complaint".

The State Board attempted to substitute a charge sheet for a complaint. Petitioner again filed a special demurrer, which was overruled, then a general demurrer, which was overruled. He filed an Answer. The Board then filed with the Board a Reply to the Answer. The trial proceeded.

Without any complaint presented in advance or even before questioning witnesses, the Secretary of the Board brought on some evidence as to the three patients, and the Board's counsel announced that this closed the hearing except for the Secretary's testimony. As to each of these three patients, the testimony of the witnesses was taken first, but after the testimony the Board's counsel presented and filed in evidence signed statements making complaint against Dr. Bandeen. These were complaints which the State Board has sent out its employees to solicit. The statements were kept

secretly in the Board's files, and no copies furnished until they were introduced in evidence. The Board was evidently embarrassed at finding no patient of Dr. Bandeen's who would file a complaint.

In this case there was not only a failure to comply with the Statute as to jurisdiction, but a wilful flaunting of the statutory requirements. It is hard to understand how the Kentucky Court of Appeals could overlook these jurisdictional facts.

Such disregard of petitioner's rights is certainly in violation of the due process clause of the Fifth Amendment, as well as denying petitioner equal protection of the laws. Existence of such flagrant acts should require this case to be considered and reversed by this Court.

In *State of Kansas* v. *Occidental Life Ins. Co.*, 95 F. 2d 935 (C.A. 10th), a question of "due process" was considered. The Opinion says (p. 937):

> "The remaining contention advanced is that the contract of reinsurance and the decree approving it do not authorize the withdrawal of the deposited securities, and that the order requiring their withdrawal and delivery violates due process clause in the Fifth Amendment to the Constitution of the United States. The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

A petition for certiorari to that Opinion was denied by this Court. 305 U. S. 603, 59 S. Ct. 63, 83 L. Ed. 383.

The same principles are recognized by this Court as applicable to a State Real Estate Commission, the Opinion condemning the Commission withholding data. *Bratton, et al.* v. *Chandler*, 260 U. S. 110, 67 L. Ed. 157, 43 S. Ct. 43.

In that case a District Court with three judges had held a state Act providing for issual of real estate licenses, unconstitutional because the Board could procure other secret evidence. This Court reversed the case, holding that the Act did not intend secrecy in license hearings. Then this Court said that with the Act so construed, it "will leave no power with it (the Commission) that it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States."

That decision certainly condemns the actions of the State Board of Health in procuring and secreting the complaints solicted from the various individuals who appeared as witnesses against the Petitioner. The principle announced in the Chandler case means that the State Board of Health in this case had not complied with the Medical Practice Act as to the action to acquire jurisdiction for the holding of revocation proceedings against petitioner. It had no jurisdiction here.

2. FAIR AND IMPARTIAL HEARING.

Can the State Board of Health of Kentucky admittedly consider as evidence, and base its decision at least in part upon, facts not in evidence?

Sending to Dr. Bandeen show-cause letters indicated an attitude of pre-judging. Even the unsigned charge sheet entitled "Copy of Complaint" was an evasion and the filing by the Board of a Reply to a petitioner's Answer further aligned the Board against petitioner in advance. In fact, the Board's Secretary took such an antagonistic attitude toward Dr. Bandeen in advance, that objection was made to his participating as a member of the Board. This was emphatically overruled.

This Secretary, Doctor Underwood, insisted on his right to sit as a member of the Board. In fact, once speaking for the Board, Dr. Underwood said:

> "Now we are not trying any of the specific charges. We are trying the general charge of grossly unprofessional and dishonorable conduct with the two features that are in it, deception and defrauding of the public."

Dr. Underwood even stated early in the hearing: "At the end of that time I will introduce a statement, not attempting to prove it * * *". The Board did permit Dr. Underwood to introduce a four page hearsay memo.

The testimony as to petitioner treating two of his patients was as to use of a Koch treatment. This is an

oxygenizing medicine used sometimes in cancer cases. Dr. Bandeen testified that he gave it if so requested by the patient. The only adverse testimony as to it was Dr. Underwood's statement that: "We say there is some question as to the value of it". Dr. Bandeen was asked if the American Medical Association had considered it, and he said that Association does not recommend it.

Then petitioner's counsel offered to go into the merits of this medicine, but the Board refused to permit this. That was natural, as the question is most controversial. We had supposed that ruling eliminated that issue.

There was no medical testimony against the use of the medicine. *Smith* v. *Department of Registration, etc.*, 412 Ill. 332, 106 N. E. 2d 722, was a case involving use of this medicine, with no medical testimony. In holding void the proceeding against Dr. Smith, the Illinois Supreme Court said (106 N. E. 2d 730):

> "As we have indicated heretofore, the revocation of a professional license involves serious consequences, both to the licensee under attack and to the public. The charges must be specific and the proof clear and convincing. If Dr. Smith is dishonest in his practice and if the 'Koch Treatment' is without value, it was a simple matter for the Department to have produced such proof. This court possesses neither medical learning nor powers of telepathy."

Instead of dropping this issue, counsel for the State Board filed a Reply Brief about November 30, 1951

(nearly 15 months later), with a copy of an Opinion in a case before the Federal Trade Commission. Had the Board re-opened this proceeding for more evidence then petitioner would certainly have objected and believes that this Opinion would have been held inadmissible as proof of any facts.

The State Board did not re-open this proceeding. The Opinion was not offered in evidence. When this injunction suit was filed, the State Board sought to justify its Order, in which no facts had been found. Its Answer (Appendix C-2) says in Paragraph Two:

> "Thereafter the Board, on December 13, 1951, after duly considering the Transcript of Record and the Transcript of Proceedings, * * * and also a decision of the Federal Trade Commission * * * finding that the so-called Koch Cancer Treatment has no therapeutic value but has adverse effects on some people, * * *."

The State Board had no evidence presented before it as to the therapeutic value of the Koch Treatment, and chose to treat the Federal Trade Commission's findings as evidence of facts upon which to base its Order. The Board treated this as evidence, and, according to the Board's Answer in this case, "reached the opinion that the Plaintiff had, by prescribing and administering the so-called Koch Cancer Treatment . . . engaged in acts and conduct that were grossly unprofessional and dishonorable . . ."

Whether the Kentucky Court of Appeals considers the recitals in Federal Trade Commission Opinion as

facts or law, the State Board says it based its ruling on these facts.

This demonstrates that this Board of Health did not appreciate the importance of fundamental rights in its duties as a tribunal with semi-judicial functions. Whether or not the evidence affected the decision, the Board had no right to go outside the evidence introduced. This has been specifically held in cases arising in Kentucky.

Int. Comm. Commission v. *L. & N. R. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431;

I. C. R. R. Co. v. *R. R. Comm. of Kentucky*, 1 F. 2d 805.

This Court made this same ruling in *U. S.* v. *Abilene & Southern Ry.*, 265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016. This Court has also held void an order of a State Commission for using evidence outside the record. *Ohio Bell Telephone Co.* v. *Pub. Util. Comm.*, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093.

Professor Davis in his text on Administrative Law fully supports the principles of the *Ohio Bell* case.

Even the evidence from the Commission opinion related only to the making of claims of certain attributes as to the Koch medicine. That Commission did not attempt to stop the use of such medicine. It can be used by doctors who believe it proper in the particular case. The *Forman* case, cited *supra*, says that if the doctor was sincere in his treatments, his license may not be revoked.

3. STATE BOARD ORDER—NEVER IN EFFECT AND VOID.

Is an Order of the State Board of Health of Kentucky revoking a license to practice osteopathy, never affirmed by the Governor while law in effect, and made without finding any specific facts as basis for such an order, valid and enforceable?

The Order rendered by the State Board of Health of Kentucky on December 13, 1951, reads in part as follows (Appendix B-7, p. 39):

> "this order of revocation shall become effective at midnight on December 30, 1951, unless prior thereto said Respondent appeals to the Governor of the Commonwealth of Kentucky in the manner provided by Section 311.120(3) Kentucky Revised Statutes, in which event this order of revocation shall stand suspended pending decision by said Governor upon said appeal."

The procedure in the statute as to revocation proceedings (Appendix A-2) gave the right of appeal to the Governor who could affirm or overrule the Board's Order. Until the Governor had acted, no action in the revocation proceedings was final. In this case the Governor failed to make any decision before June 19, 1952.

At that time provisions previously controlling such proceedings were expressly repealed (Appendix A-4), with no saving clause as to pending revocation proceedings. Presumably the new Act, promoted by the State Board, has modernized the Medical Practice Act. Any

new revocation proceedings must be pursuant to the new Act.

At the time the repeal took effect on June 19, 1952, the Board's Order of December 13, 1952, was not in effect. This was an unfinished case, not affirmed. The new Act provides that all licenses heretofore issued by the Board are declared to be valid, "unless they have become expired, cancelled, suspended or revoked in accordance with law" (K. R. S. Section 311.615(1) (1953 Ed.) Appendix A-3). Since the Governor had never affirmed the Board's Order, this declared Dr. Bandeen's license valid. The new Act provided that no license should thereafter be revoked except in accordance with entirely new procedure (K. R. S. Section 311.570(7) Appendix A-5).

The general rule applicable to pending proceedings in case of repeal of a statute is stated in 50 American Jurisprudence 536, under "Statutes" Section 530, as follows:

> "Under the common law, it has been held that, if a statute is unconditionally repealed without a saving clause in favor of pending suits, all pending proceedings thereunder are terminated, and if final relief has not been granted before the repeal goes into effect, it may not be afterwards. This is true of the repeal of a law relating to procedure or of a law conferring jurisdiction in which case the right to proceed further in an action that is pending but undetermined at the time of the repeal is taken away."

This rule applies in Kentucky.

Treacy v. *E. L. & B. S. R. Co.*, 85 Ky. 270, 3 S. W. 168;

W. U. Tel. Co. v. *L. & N. R. R. Co.*, 258 U. S. 13, 66 L. Ed. 437.

The Western Union case cited above involved repeal of a condemnation statute after a condemnation judgment had been reversed. This Court's Opinion says in part (258 U. S. 19):

> "It takes away the power to condemn the right of way of a railroad company by telegraph companies, and it does not save proceedings commenced before its applicable date. Such reservation is usual, if intended."

This Court's Opinion discusses the *Treacy* case cited *supra* and says as to it (258 U. S. 20):

> "and the proceedings being thus *in fieri*, the law under which they were instituted could be repealed, and, if repealed, the subsequent proceedings must be under the new law."

That fits the present unfinished proceedings, where the substantive provisions were continued. Procedure must be controlled entirely by the new law.

The mere fact that the new Act includes the same substantive provisions and more, does not affect the result as to the procedural provisions being completely changed. The Kentucky Court of Appeals really dodged the issue by saying that "it would seem" that

as to an unfinished proceeding the petitioner should have adopted the final stages of the new procedure when the laws says that all stages must be under the new procedure. The Court really attempts to give life to an unfinished, unaffirmed Order.

As indicated, the Order never became effective. Petitioner's position is, however, that if it had, the Order was void because the State Board had not performed its *quasi*-judicial functions.

The Opinion points out that the Statute does not specifically require that the Board recite its findings. The Opinion of the Kentucky Court of Appeals cites Davis on Administrative Law as saying this is not necessary. We understand Professor Davis to say that this is necessary. His text says (p. 527):

> "Both legislatures and courts have seen fit to impose the requirement, the courts sometimes interpreting or purporting to interpret statutory provisions and sometimes creating common law. The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.
>
> "Much the most prominent reason discussed in judicial opinions is the facilitation of judicial review."

In Kentucky the Court of Appeals held void one Medical Practice Act because the Act gave no standards for the State Board to use. *Matthews* v. *Murphy*, 63 S. W. 785, 23 K. L. R. 750, 54 L. R. A. 415. The

next Act was upheld despite an indefinite provision as to other grossly unprofessional or dishonorable conduct. The Court said it could be upheld only by limiting this provision to conduct of like character with specific grounds named. *Forman* v. *State Board of Health*, 157 Ky. 123, 162 S. W. 796.

The effect of the holding by the Kentucky Court of Appeals in this case is really to leave to the State Board entirely a legal construction as to what facts constitute violations of the Act in effect in 1950. We think the medical profession in Kentucky deserves to have this interpretation of the Kentucky laws reversed, so that the Courts and the public can know as well as the members of the State Board whether or not a doctor has violated a statute.

The Kentucky Court of Appeals has held that the duties of administrative agencies are to find the existence of certain facts, and then to these findings of fact the law is applied. *L. H. & St. L. Ry. Co.* v. *Lyons*, 155 Ky. 396, 159 S. W. 971. That is exactly the principle announced by this Court in setting aside the Order entered in the noted Hot Oil case, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446.

Professor Davis may think that practical reasons for required findings are more important than constitutional reasons, but this Court has continued to recognize that requirement, as announced in the *Panama Refining* case. We find the following cases since the *Panama Refining* case still recognize the fact that without such findings the administrative agency has

not complied with the constitutional requirements in making Orders based upon such findings.

Opp. Cotton Mills v. Administrator, 312 U. S. 126, 61 S. Ct. 524, 85 L. Ed. 624;

U. S. v. Carolina Freight Carriers, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971;

S. E. C. v. Chenery Corp., 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626.

The statement in the Kentucky Court's Opinion as to findings not being a constitutional requirement is directly in conflict with these decisions from this Court.

CONCLUSION.

The State Board of Health of Kentucky has not only failed to comply with the Act as to jurisdiction for revocation proceedings, but has flaunted the requirements. It has considered facts not in evidence, and admitted such fact in its Answer in this case, saying that these facts were part of the basis for its decision.

On both these grounds and on account of failing to make the necessary findings of fact, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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